Detroit Newspaper Agency, d/b/a Detroit Newspapers *and* Local No. 372, International Brotherhood of Teamsters, AFL–CIO and Detroit Mailers Union No. 2040, International Brotherhood of Teamsters, AFL–CIO. Cases 7–CA–40270, 7–CA–40272, 7–CA–40289, 7–CA–40331, and 7–CA–40556

November 21, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On March 13, 2000, Administrative Law Judge Richard A. Scully issued the attached decision. The General Counsel and Charging Parties each filed exceptions and supporting briefs and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as explained below and to adopt the recommended Order as modified and set forth in full below.

The Respondent is a joint operating partnership of two Detroit area newspapers (the Detroit News and Detroit Free Press), carrying out their noneditorial functions including printing, distribution, sale of advertising, and promotion. In *Detroit Newspapers*, 326 NLRB 700 (1998), the Board concluded that the Respondent's employees (and the employees of the News and the Free Press) had struck in reaction to unfair labor practices committed by the News during bargaining. Consequently, the Board held that all the striking employees were either unfair labor practice strikers or sympathy unfair labor practice strikers, depending upon the identity of their employer. On July 7, 2000 (after the administrative law judge had issued his decision in the instant case), the United States Court of Appeals for the District of Columbia Circuit granted the Respondents' petition for review and rejected the Board's conclusion that unfair labor practices had caused the strike. *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109 (2000), motion for reconsideration denied by unpublished decision (August 31, 2000). In light of the Court's decision, we accept as the law of the case that the strike was an economic strike. Consequently, we have revised the judge's remedy and recommended Order to grant the discriminatees the rights of returning economic strikers. *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

Under *Laidlaw*, economic strikers who unconditionally apply for reinstatement (whether by themselves or by their Union on their behalf), are to be reinstated to their former jobs. However, if their positions were filled by permanent replacements prior to their offer to return to work, the strikers are entitled to full reinstatement on a nondiscriminatory basis either upon the departure of the permanent replacements or if those positions no longer exist, to substantially equivalent positions, unless they have in the meantime acquired other regular and substantially equivalent employment or the employer can show that it failed to offer reinstatement for legitimate and substantial business reasons. *Rose Printing Co.*, 304 NLRB 1076 (1991). In accordance with these principles, we shall order the Respondent to offer to reinstate Kociemba and Schafranek immediately to their former positions or, if they were permanently replaced prior to the Unions' offer to return to work in February 1997, to afford them the rights of permanently replaced economic strikers under *Laidlaw Corp.*, supra. The strikers shall be

[1] The parties reached a nonBoard settlement satisfactory to the General Counsel regarding the discharges of Larry Hoffman, Manuel Sanchez, and Gregory Lysz in Cases 7–CA–40270, 7–CA–40272, and 7–CA–40289. By Order dated August 20, 2003, the Board granted a motion by the General Counsel to sever those cases from these proceedings, approve the Charging Parties' request to withdraw those cases, and dismiss the corresponding complaint allegations. In the absence of exceptions, we adopt the judge's findings that the discharges of James Schafranek in Case 7–CA–40556 and Gerald Kociemba in Case 7–CA–40331 violated Sec. 8(a)(1) and (3).

Our dissenting colleague joins in finding that the Respondent violated Sec. 8(a)(1) by discharging employees James Schafranek and Gerald Kociemba, but he objects to the accompanying cease-and-desist order. Our Order is consistent with the Board's longstanding practice in cases where a violation is found under *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964). We see no reason for revisiting this practice here, particularly where the Respondent has not excepted either to the finding of the violation or to the remedy.

Our dissenting colleague also would have the Board forswear the authorization of contempt proceedings in this or any case decided under *Burnup & Sims*, supra. The issue is not ripe—the General Counsel has not sought to institute contempt proceedings—and the possibility of such proceedings is particularly remote here. Because the Respondent did not contest the violations or the remedy, there is little likelihood that the Respondent will fail to comply with the Board's Order and that the Board will need to seek court enforcement. Absent a court order, the Board cannot initiate contempt proceedings. See Sec. 10(e); Sec 101.15 of the Board's Rules and Regulations (2002). Our colleague's assertion that the Order will cause the Respondent to "over comply" by foregoing lawful employee discipline in order to avoid the possibility of further mistakes is pure speculation. In any event, it is not unreasonable to require a respondent to be more careful when making decisions concerning discipline that directly affects employees' exercise of Sec. 7 rights.

made whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[2]

ORDER

The National Labor Relations Board adopts the recommended Order as modified and set forth in full below and orders that the Respondent, Detroit Newspaper Agency, d/b/a Detroit Newspapers, Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging its employees' activity on behalf of a labor organization by discharging striking employees who have not engaged in serious misconduct.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Gerald Kociemba and James Schafranek full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, if they were not permanently replaced before their Union's February 1997 offer to return to work, dismissing if necessary any replacements hired thereafter. If no employment is available for the discriminatees, they shall be placed on a preferential hiring list based on seniority, or some other nondiscriminatory test, for employment as jobs become available.

(b) Make Gerald Kociemba and James Schafranek whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at each of its facilities in the State of Michigan, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 22, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 21, 2003

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Wilma B. Liebman, Member

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Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[2] There is no allegation that the Respondent unlawfully failed to reinstate the strikers on request in February 1997. The complaint alleges, and we have found, that the Respondent unlawfully discharged Kociemba and Schafranek. Thus, any make-whole relief shall run from the dates of the discharges. To clarify, since Kociemba and Schafranek were economic strikers, the Respondent's backpay liability is contingent on whether they were permanently replaced prior to the date of the Unions' unconditional offer to return to work. If either or both were thus replaced, no backpay would be owing for any period of time the replacement(s) continued in the Respondent's employ during the backpay period.

We shall substitute a new order to conform with the *Laidlaw* remedy and our decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). Further, we shall substitute a new notice to conform to the above as well as to our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER SCHAUMBER, dissenting in part.

To the extent my colleagues order the Respondent to cease and desist from doing that which, on the facts presented here, it cannot reasonably and responsibly avoid doing, I respectfully dissent.

I. THE SUPREME COURT'S RATIONALE IN *BURNUP & SIMS*

In *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), the employer discharged two employees based on a good-faith belief that the employees, while soliciting a third employee for membership in the union, told the employee being solicited that "the union would use dynamite to get in if the union did not acquire the authorizations." 379 U.S. at 21. As it turned out, the employer was mistaken. In its brief to the Court, the Board argued that although the employer acted based on a good faith but mistaken belief in the employees' misconduct, an 8(a)(1) violation finding was necessary because of the *effect* of the discharges. The Court agreed, reasoning that

> [o]therwise the protected activity would lose some of its immunity, since the example of employees who are discharged on false charges would or might have a deterrent effect on other employees. Union activity often engenders strong emotions and gives rise to active rumors. A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith. It is the tendency of those discharges to weaken or destroy the Section 8(a)(1) right that is controlling.

379 U.S. at 23–24.

II. THE JUDGE'S DECISION AND RECOMMENDED ORDER

My colleagues and I do not disagree with the administrative law judge's finding that the Respondent held a good-faith but mistaken belief that employees Gerald Kociemba and James Schafranek had engaged in serious strike-related misconduct. Properly applying a *Burnup & Sims* analysis, the judge found their discharges unlawful because the employees did not, in fact, do what the Respondent believed they did. Thus, the judge correctly entered an unfair labor practice finding because, in keeping with the rationale of *Burnup & Sims*, explained above, not to do so would undermine Section 7 rights. That is, the Respondent's innocent mistake necessitates finding a violation because "[o]therwise the protected activity would lose some of its immunity." *Burnup & Sims*, supra at 23.

Undoubtedly relying on prior Board orders in cases of this nature, the judge then recommended ordering the Respondent, "its officers, agents, successors, and assigns," to cease and desist from

> (a) Discouraging its employees' activity on behalf of a labor organization by discharging striking employees who have not engaged in serious misconduct.
>
> (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

My colleagues adopt this order.

III. THE ORDER LACKS A RATIONAL BASIS AND CHILLS LAWFUL CONDUCT

Finding a violation to remedy an effect is one thing; issuing the foregoing cease-and-desist order is something else. Although consistent with longstanding Board practice, the order lacks a rational basis. In this case, and in all cases involving *Burnup & Sims*–type violations, there is no evidence that the employer failed to conduct an adequate investigation or otherwise prevented itself from discovering its mistake. On the contrary, the employer in these cases acts reasonably and in good faith, but errs. In effect, therefore, my colleagues order the Respondent not to make innocent mistakes in the future. It is tantamount to ordering the Respondent to be infallible. However, the absurdity of the order is not the worst of its drawbacks. A cease-and-desist order, once enforced by a court of appeals, becomes a vehicle for bringing contempt proceedings. Since the Respondent is not infallible, the only way it can be certain of avoiding a possible contempt proceeding is to refrain from discharging *anyone* for strike-related misconduct, lest it commit another innocent, good-faith mistake. But at the same time, the Respondent cannot reasonably and responsibly avoid discharging those who genuinely pose a threat to the safety of its employees, the security of its property, or the orderliness and discipline necessary to any workplace.

Thus, the majority's cease-and-desist order is as problematic as it would be if it were directly contrary to Federal Rule of Civil Procedure 65(d). Rule 65(d) requires injunctions to be specifically worded in order "to prevent uncertainty and confusion" and "to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). The chief harm Rule 65(d) seeks to prevent is the inhibition of lawful and socially desirable conduct. 11A Charles Alan Wright et al., *Federal Practice & Procedure* § 2955 (2d ed. 1995). That is the very harm that my colleagues' cease-and-desist order would likely inflict by inhibiting the discharge of employees who truly have engaged in strike-related misconduct.

Applying Rule 65(d) in *International Longshoremen's Assn., Local 1291 v. Philadelphia Marine Trade Assn.*,

389 U.S. 64 (1967) (*Longshoremen ILA*), the Supreme Court set aside a contempt order against a union because the order was based on an injunction that defied comprehension. In explaining its decision, the Court used unusually harsh language not entirely out of place here:

> The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a [F]ederal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid. Because the decree of this District Court was not so framed, it cannot stand. And with it must fall the District Court's decision holding the union in contempt. We do not deal here with a violation of a court order by one who fully understands its meaning but chooses to ignore its mandate. We deal instead with acts alleged to violate a decree that can only be described as unintelligible. The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension.

389 U.S. at 76.

The cease-and-desist order at issue here similarly defies comprehension—not because it is unintelligibly vague, as in *Longshoremen ILA*, but because on the facts presented, it commands the impossible: infallibility. Furthermore, the order is simply unintelligible *as an order*. An order commands obedience, and thus necessarily requires an intentional act to be violated. Here, however, the order can be disobeyed *by mistake*, which is a contradiction in terms. Nevertheless, another unintentional, good-faith mistake on the Respondent's part would violate the majority's order and expose it to the threat of civil contempt proceedings. That threat itself is a potent weapon because contempt proceedings, if commenced, can have ramifications beyond the courtroom regardless of their judicial disposition. Thus, if the Respondent takes the Board's order seriously, and presumably we intend our orders to be taken seriously, it will likely refrain from discharging any employee for strike-related misconduct lest it make another mistake. In short, the Board's order will chill perfectly lawful conduct, and therefore it contravenes the policies underlying Rule 65(d) if not the rule itself.

IV. REVISING THE MAJORITY'S ORDER

It is easy to see what is wrong with the majority's order; it is less easy to fix it. Section 10(c) of the Act provides that the Board "shall" issue a cease-and-desist order when it finds any unfair labor practice. Applied as written, this would include *Burnup & Sims*–type unfair labor practice findings. Authority exists for the proposition that Section 10(c) should not be applied as written here because to do so yields an absurd result—an order forbidding innocent mistakes—that was beyond Congress' intent when it legislated the Act. See *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 510–511 (1989) (holding that Federal Rule of Evidence 609(a)(1) "can't mean what it says" because its literal command is "unfathomable"); see also id. at 528–529 (Scalia, J., concurring). Without grappling with the implications of *Bock Laundry* in this case, the most fundamental postulates of our legal order, including the policy imperatives underlying Rule 65(d), require that cease-and-desist orders issued by the Board in cases predicated on a *Burnup & Sims* rationale be drawn so as to avoid chilling lawful conduct. My colleagues' order fails to do so.

Thus, I believe we must refashion the order in this case and similar cases to remove the threat of contempt proceedings. I would revise paragraph 1(a) of the Order to read as follows:

> Respondent shall cease and desist from discharging striking employees who have not engaged in strike-related misconduct.[n]
>
> [n] Sec. 10(c) of the Act requires the Board to issue a cease-and-desist order when it finds that any unfair labor practice has been committed. Consistent therewith, the Board has entered the above order. However, because the Respondent acted innocently, solely on the basis of a good-faith but mistaken belief that Gerald Kociemba and James Schafranek engaged in unprotected misconduct, the Board will not authorize contempt proceedings based on this cease-and-desist order for any future violation of the Act.
>
> This order reflects a change from prior cease-and-desist orders issued by the Board in cases involving unfair labor practices predicated on the rationale set forth in *Burnup & Sims*, 379 U.S. 21 (1964). We find the order herein more consistent with the nature of the violation found, while continuing to satisfy the requirements of Sec. 10(c).

Admittedly, the absurdity of commanding infallibility remains, but it would be a harmless absurdity, the reason for which the parties will understand. Needless to say, I would omit entirely paragraph 1(b), which enjoins the Respondent from violating the Act "[i]n any like or related manner." One absurdity per order is enough.

My colleagues say that my proposal to preclude contempt proceedings based on cease-and-desist orders in this and similar cases is "not ripe" because "the General Counsel has not sought to institute contempt proceed-

ings." That misses the point. The chilling effect of cease-and-desist orders in cases such as this one proceeds immediately from the order itself. It arises not from the actual institution of contempt proceedings, but from the *risk* of incurring those proceedings through the inadvertent commission of another good-faith mistake. Thus, I agree with my colleagues that "there is little likelihood that the Respondent will fail to comply with the Board's order." Indeed, because of the chilling effect of that order, the Respondent will tend to *over comply*, foregoing lawful employee discipline in order to avoid the possibility of further mistakes. That effect, fully ripe the moment the majority's order issues, is eliminated by removing the possibility of contempt proceedings.

My colleagues also defend their cease-and-desist order by saying that "it is not unreasonable to require a respondent to be more careful when making decisions concerning discipline that directly affects employees' exercise of Section 7 rights." However, there is no evidence that the Respondent was less than careful in its decisionmaking. On the contrary, in each instance, the Respondent investigated the suspected misconduct and formed a reasonable, good-faith belief that the employee in question had engaged in it. To suggest that some undefined degree of care should be required, *beyond* what the Respondent has already exercised, confirms the tendency of the majority's order to chill lawful conduct.

Dated, Washington, D.C. November 21, 2003

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD
APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discourage our employees' activity on behalf of a labor organization by discharging striking employees who have not engaged in serious misconduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Gerald Kociemba and James Schafranek full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, if they were not permanently replaced before the Unions' February 1997 offer to return to work, dismissing if necessary any replacements hired thereafter. If no employment is available for the discriminatees WE WILL place them on a preferential hiring list based on seniority, or some other nondiscriminatory test, for employment as jobs become available.

WE WILL make Gerald Kociemba and James Schafranek whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Gerald Kociemba and James Schafranek, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

DETROIT NEWSPAPER AGENCY, D/B/A DETROIT NEWSPAPERS

Joseph P. Canfield, Esq., Patricia A. Fedewa, Esq., and *Erickson C. N. Karmol, Esq.,* for the General Counsel.

Robert M. Vercruysse, Esq., Bernice McReynolds, Esq., and *William E. Altman, Esq.*, of Bingham Farms, Michigan, for the Respondent.

David Radtke, Esq., of Southfield, Michigan, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. Upon charges filed by, Local 372, International Brotherhood of Teamsters, AFL–CIO (Local 372), and Detroit Mailers Union No. 2040, International Brotherhood of Teamsters, AFL–CIO (Local 2040), the Regional Director, Region 7, National Labor Relations Board (the Board), issued complaints alleging that the Detroit Newspaper Agency, d/b/a Detroit Newspapers (DNA), had committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).[1] These cases were

[1] The charges in Cases 7–CA–40270 and 7–CA–40272 were filed on October 1, 1997, and a consolidated complaint was issued on November 13, 1997. The charge in Case 7–CA–40289 was filed on October

consolidated by the Regional Director in an order issued on May 12, 1998. The Respondent filed timely answers to the complaints denying that it had committed any violation of the Act.

A hearing was held in Detroit, Michigan, on November 30 through December 3, 1998, and March 18, 1999, at which all parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument.[2] Briefs submitted on behalf of the General Counsel and the Respondent have been given due consideration. Upon the entire record, and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

At all times material, the DNA was organized as a Joint Operating Agreement (JOA) partnership pursuant to the Federal Newspaper Preservation Act and under Michigan law. The Detroit News, a subsidiary of Gannett Newspapers, Inc. (The News), and The Detroit Free Press, a subsidiary of Knight-Ridder Newspaper, Inc. (The Free Press), have been copartners doing business for the purposes set forth in the following paragraph under the trade name and style of Detroit Newspapers, formerly known as Detroit Newspaper Agency.

At all times material, the DNA has maintained an office and place of business at 615 West Lafayette, Detroit, Michigan, and has engaged in the publishing and circulation operations of all nonnews and noneditorial departments of The News and The Free Press as a unified business enterprise as agent for and for the benefit of both newspapers and is responsible for selling advertising, printing, and distributing the two newspapers.

During each of the calendar years 1995 and 1996, the DNA in the course and conduct of its business operations derived gross revenues in excess of $500,000 and purchased and received at its facilities in the State of Michigan newsprint and other goods and materials valued in excess of $50,000 directly from points outside the State of Michigan.

The Respondent admits, and I find, that at all times material it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The Respondents admit, and I find, that at all times material both of the Charging Unions have been labor organizations within the meaning of Section 2(5) of the Act.

17, 1997, and the complaint was issued on November 26, 1997. The charge in Case 7–CA–40331 was filed on October 17, 1997, and the complaint was issued on December 8, 1997. The charge in Case 7–CA–40556 was filed on January 8, 1998, and the complaint was issued on February 25, 1998.

[2] To avoid unnecessary duplication of effort and evidence, these cases were consolidated for hearing with Cases 7–CA–38079, et al. (*DNA I*) which were being heard by me. To avoid delay in issuing a decision in Cases 7–CA–38079, et al., these cases were severed by order dated December 16, 1999.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Since the JOA went into effect in 1989, the DNA has carried out the noneditorial functions of The News and The Free Press, including, the printing, distribution, sale of advertising for, and promotion of the two newspapers. The News and The Free Press operate separate and independent editorial and news departments.

The DNA has its offices in The News building on West Lafayette Boulevard. It has two production facilities, the Riverfront plant on West Jefferson in Detroit and the North plant in Sterling Heights, Michigan. It also has a number of distribution centers located throughout the Detroit and suburban areas where newspapers are picked up by single copy drivers for delivery to retailers and newspaper racks and by carriers for home delivery.

At the DNA, Teamsters Local 372 represents circulation department employees and Teamsters Local 2040 represents mailers. The collective-bargaining agreements between the employers and the Unions that went on strike expired on April 30, 1995. On July 13, 1995, a total of six unions struck the DNA, The News, and The Free Press and over 2000 employees went out on strike. The strike lasted until February 1997, when the striking Unions made unconditional offers to return to work. In prior decisions in unfair labor practices cases arising from the strike, the Board has held that the strike was caused by the three employers' unfair labor practices[3] and that they violated Section 8(a)(3) and (1) by failing to reinstate unfair labor practices strikers who have made unconditional offers to return to work.[4] An issue not reached in *Detroit Newspapers II*, to be decided here, is whether the DNA lawfully discharged certain of those strikers because they had engaged in serious misconduct during the strike.

B. Applicable Legal Principles

In cases involving the discharge of striking employees for engaging in strike-related misconduct, the burden of going forward shifts, but the General Counsel has the overall burden of proving discrimination. *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964); *Gem Urethane*, 284 NLRB 1349, 1352 (1987). Initially, the General Counsel must establish that the employee was a striker and that the employer took action against him for conduct associated with the strike. At that point, the burden shifts to the employer to establish that it had an honest belief that the employee engaged in the conduct for which he was discharged. If it does so, then the General Counsel must affirmatively establish that the employee did not engage in such misconduct or that the misconduct was not sufficiently egregious to warrant discharge. *Gem Urethane*, supra at 1352; *Laredo Coca Cola Bottling Co.*, 258 NLRB 491, 496 (1981); *Rubin Bros.*, 90 NLRB 610, 611 (1952).

The employer's burden of establishing its "honest belief" is no more than that and does not require it to prove that the striker did in fact engage in misconduct. *Axelson, Inc.*, 285

[3] *Detroit Newspapers I*, 326 NLRB 700 (1998).
[4] *Detroit Newspapers II*, 326 NLRB 782 (1998).

NLRB 862, 864 (1987); *Gem Urethane*, supra at 1352. It does, however, require more than the mere assertion that it had such a belief. There must be some specificity, linking particular employees to particular allegations of misconduct. *Beaird Industries*, 311 NLRB 768, 769 (1993); *General Telephone Co. of Michigan*, 251 NLRB 737, 739 (1980). The employer's "honest belief" may be based on hearsay sources, such as, the reports of nonstriking employees, supervisors, security guards, investigators, police, etc. *Clougherty Packing Co.*, 292 NLRB 1139, 1142 (1989); *Newport News Shipbuilding*, 265 NLRB 716, 718 (1982); *General Telephone Co.*, supra at 739.[5] Whether or not the employer had an "honest belief" is judged on the basis of the evidence available to it when it took the disciplinary action and it need not attempt to get the striker's side of the story before doing so. *Giddings & Lewis*, 240 NLRB 441, 448 (1979); *Associated Grocers of New England*, 227 NLRB 1200, 1207 (1977).

Not all misconduct is sufficient to disqualify a striker from further employment. *Medite of New Mexico*, 314 NLRB 1145, 1146 (1994). In *Clear Pine Mouldings*,[6] the Board held that strike misconduct is disqualifying if, under all of the surrounding circumstances, it may reasonably tend to coerce or intimidate other employees in the exercise of rights protected under the Act. The *Clear Pine Mouldings* standard is an objective one and does not involve an inquiry into whether any particular employee was actually coerced or intimidated. *Mohawk Liqueur Co.*, 300 NLRB 1075 (1990). This standard also applies to misconduct directed at nonemployees such as supervisors, security guards, and independent contractors. *General Chemical Corp.*, 290 NLRB 76, 82 (1988); *PBA, Inc.*, 270 NLRB 998 (1984).

An employer may not knowingly tolerate behavior by nonstrikers or replacement employees that is at least as serious, or more so, than the conduct it is relying on to discharge a striker. *Chesapeake Plywood*, 294 NLRB 201, 204 (1989); *Champ Corp.*, 291 NLRB 803, 806 (1988); *Aztec Bus Lines*, 298 NLRB 1021, 1027 (1988). Consequently, even in a case where a striker has engaged in serious misconduct, he may still be entitled to reinstatement if the General Counsel establishes that the employer has applied a double standard in dealing with strike misconduct and that the disciplinary action taken against the striker amounts to disparate treatment.

C. The Respondents' Disciplinary Procedures

After the strike began and the three employers received complaints of striker misconduct, they set up procedures for reporting, investigating, and taking disciplinary action on strike-related complaints. These procedures related only to allegations of striker misconduct and did not displace the prestrike disciplinary systems that applied to working employees and were generally handled by departmental supervisors. The separate strike-related disciplinary process was coordinated by John Taylor, the DNA's director of labor relations and senior legal counsel. Once an allegation of strike-related misconduct was received, it was usually investigated by DNA security personnel or by independent investigators specifically retained for that purpose.[7] In cases where the investigation identified an alleged perpetrator of misconduct, all of the information was forwarded to Taylor. If Taylor decided that no disciplinary action was warranted no further action was taken. If he determined that disciplinary action should be taken, he forwarded all of the information to the appropriate decisionmaker along with his recommendation. For the DNA, the final decision on disciplining its employees for strike-related misconduct was made by Timothy Kelleher, senior vice president, labor relations.

I find no evidence that the separate disciplinary process set up by the employers to handle complaints involving strike-related misconduct was discriminatory, in and of itself.[8] Under the circumstances, it was a reasonable way of handling a large number of complaints which differed significantly from the kind of everyday disciplinary problems with which departmental supervisors normally dealt. Often, complaints against striking employees involved incidents that were far removed from their normal workplaces and presented issues which required legal and/or labor relations expertise. In all likelihood, a departmental supervisor, who issues discipline based on absenteeism, lack of productivity, or other workplace matters, may well lack the experience and/or competence to judge incidents of strike misconduct which, under *Clear Pine Mouldings*, supra, turn on whether or not they coerce or intimidate other employees exercising protected rights. The Respondents' system encouraged uniformity in how incidents were investigated, the appropriate standard was applied, and the disciplinary actions that were taken. I also find that the fact that in some cases there was a considerable delay before disciplinary action was taken does not constitute evidence of a discriminatory motive. The large volume of reported incidents that had to be investigated obviously caused some delays. In some incidents involving large numbers of strikers, information that had initially been unavailable or overlooked was subsequently used to achieve uniformity in the way discipline was administered. As noted above, the Respondents were not required to seek out and get a striker's side of the story before taking disciplinary action. I find the fact that it did give nonstriking employees who were charged with misconduct such opportunities does not under these circumstances establish disparate treatment. In most cases, the nonstrikers were interviewed while at work immediately after the incidents occurred. The legal and logistical problems involved with contacting, meeting with, and interviewing striking employees made it impractical to do so. In any event, there was no credible evidence that Taylor or Kelleher ever

[5] While numerous such hearsay documents were admitted into evidence at the hearing to establish a respondent's "good-faith belief" that strikers had committed acts of misconduct, it was made clear that this was the only purpose for which each document would be considered unless another basis for admission to evidence was established.

[6] 268 NLRB 1044 (1984).

[7] A strike incident form was developed and forms were available at the Respondents' facilities for nonstriking employees, security guards, independent contractors, etc., to report incidents of misconduct, however, this form was not mandatory and was not always used. In some cases, investigations resulted from Taylor's own observation of an incident.

[8] Whether or not specific decisions constituted discriminatory disparate treatment are considered below.

refused the opportunity to be heard to any striker who requested it.

I also find no evidence that Kelleher was biased or that he and Taylor looked only for grounds to establish an "honest belief" while failing to make "an honest evaluation" of each incident of alleged misconduct. On the contrary, in the majority of the incidents I have ruled on, Kelleher's testimony established that he had an honest belief that the accused strikers had engaged in serious misconduct.

D. The Orders of the Board and the Sixth Circuit

During the course of the strike on July 24, 1996, pursuant to a settlement agreement with the striking Unions, the Board issued a broad order requiring the Unions to cease and desist from, inter alia, in any manner coercing the three employers' replacement workers and other employees, interfering with ingress and egress at their facilities, and threatening or engaging in acts of violence or vandalism against individuals, their property, or that of the Respondents. The Board's order was enforced by an Order of the U.S. Court of Appeals for the Sixth Circuit on August 16, 1996.

In many instances during the hearing, the Respondent indicated that disciplinary action was taken against strikers, at least in part, because they had violated these orders. Although the Respondent has attempted to bolster its position by asserting that strikers' actions were somehow more deserving of punishment because they violated the settlement agreement and the orders enforcing it, the fact is that the only issues involved here are whether the actions of the discharged employees were outside the protection of the Act. The orders do not purport to limit the rights of the striking employees, protected by Section 7 of the Act, nor to expand the protected rights of nonstriking employees. They are not self-help mechanisms which conferred upon the Respondent the right to determine who had violated them. What they provide is a procedure whereby violations of those rights can be dealt with by the Board and the Sixth Circuit. However, there was no evidence that any discharged striker had ever been adjudicated by either the Board or the court of appeals as having violated these orders or that any applications had ever been made to do so. As the Sixth Circuit has pointed out: "It is not the fact that there was a violation of the injunction that determines whether they [strikers] should or should not be reinstated, but the type of conduct they engaged in, and the manner and nature and seriousness of their violation of the order." *NLRB v. Cambria Clay Products*, 215 F.2d 48, 54 (6th Cir. 1954). Those determinations have yet to be made by any adjudicative body.

E. Alleged Misconduct by Strikers

1. Discharge of Larry Hoffman

Larry Hoffman has been employed by the DNA as a mailer since the JOA and had previously worked for The News, beginning in October 1979. He is a member of Local 2040. He went on strike on July 13, 1995, and has not returned to work. He testified that he did picketing throughout the strike. By letter, dated April 22, 1997, and revised May 2, 1997, he was informed that he was being discharged for throwing a projectile at an employee's car and cracking its windshield as it entered the North Plant on November 25, 1996.

Kelleher testified that he made the decision to discharge Hoffman after reviewing certain materials. They were (1) a photo identification card of Hoffman; (2) a Sterling Heights police department witness statement by Ray Hess, III, dated November 25, 1996, stating that on that date a person he identified to the police threw something at his car, breaking the windshield on the passenger side; (3) three photographs of Hess' vehicle; (4) a Sterling Heights police department report, dated November 25, 1996, stating that Hess had reported that as he entered the gate a picketer had thrown an unidentified object which damaged his windshield, that he had pointed out the perpetrator, who was identified as Hoffman; (5) an APT incident report, dated November 25, 1996, by security guard Regina Boyd, stating that on that date Hess had reported that as he crossed a picket line to enter the North Plant something was thrown at his vehicle and damaged his windshield; (6) an APT incident report, dated November 25, 1996, by Ray Hess III, stating that as he started to enter the gate at the North Plant he heard something hit the window and when he looked he saw that it was broken; (7) a DNA investigations report, by Jim Harrington stating that Hess reported that on November 25, 1996, he saw a picketer throw an object which struck his vehicle and cracked his car window, that he reported it to security and the police and that he identified Hoffman as the person he saw throw something in his direction; (8) an estimate, dated December 12, 1997, indicating that it cost $281 to repair Hess' windshield; (9) a written statement by Hess, dated April 8, 1997, describing the incident on November 25, 1997, and stating that he recognized Hoffman as the person who broke his windshield and as a person who had harassed and shouted foul language at him many times at the gate; and (10) an employee and contractor report, dated November 25, 1997, by Ray Hess III, describing the damage to his vehicle and giving a description of the perpetrator. Based on the information in these documents and photographs, he concluded that Hess' windshield had been cracked and that Hoffman, the person that Hess had identified, did it.

Hess testified that he had worked for the DNA as a truckdriver for about 2-1/2 years beginning in December 1995. On November 25, 1996, as he was entering the North Plant, he saw Hoffman who was standing on the south side of the driveway (the passenger side of his vehicle), throw an object which struck his windshield and broke it. He reported the incident to the police and identified Hoffman to them in a nearby parking lot that night. At the hearing, he identified Hoffman from a photo as the perpetrator. He said that he had a few encounters with Hoffman prior to this incident and that they often exchanged words when he crossed the picket line. He said that he was reimbursed for the damage to his windshield by both the Respondent and as a result of the court proceedings and was paid by the Respondent for the 2 days he went to court.

Sergeant Glenn Winkler of the Sterling Heights police department testified that he was dispatched to the scene as a supervisor that night. He arrived at the Excello parking lot and observed Hoffman walking towards his vehicle and detained him. He was present when Hess identified Hoffman as the

person who had damaged his vehicle and he observed the damage before leaving the scene. Officer Richard Mertz was also present that night. He arrived at the plant and spoke with Hess who told him that the person later identified as Hoffman had thrown a projectile which had cracked his windshield. Mertz observed about a 12-inch crack in Hess' windshield. Hess also pointed out the suspect who was walking away from the gate area. He radioed the information to other officers who detained Hoffman. He drove Hess over to the Excello lot where he identified Hoffman as the person who threw the projectile at his windshield.

Hoffman testified that he was familiar with Hess because, in April 1996, as he was crossing Mound Road near the North Plant carrying a picket sign, Hess had accelerated his vehicle towards him requiring him to jump onto the median to avoid being hit. He got the license number of the vehicle and reported it to the police. He identified Hess as the driver to the police but no charges were filed. He did not inform the Respondent about the incident. He said that he often saw Hess driving the same vehicle when he was picketing. On the night of November 23, 1996, after he saw Hess pass by entering the North Plant, he was questioned by the police who told him he was accused of throwing something at Hess' vehicle. He was told that the police had found no damage to the vehicle and that he was free to go. On the night of November 25, he was picketing in the same place with the two persons he usually picketed with, Lou Pare and Tony Keeland, who is now deceased. He saw Hess' vehicle stop as required before entering the plant and he, Keeland, and Pare crossed in front of it from the south to the north side of the driveway. As Hess passed by him, they made eye contact and Hess gave him a smirk. Hess drove to the guard shack where he got out of his vehicle and talked with the guard. At the end of his picketing shift as he walked to his car in the nearby Excello lot, several police cars pulled up. He was told by a sergeant that the police had received a report that something had been thrown at a vehicle and that if any damage was found he would be arrested. A few minutes later, a couple of police officers came over and told the sergeant that there was no damage. The sergeant gave him his license and told him he was free to go. He left and went home. About a month later, he was charged with damaging Hess' vehicle. He said that he went to court but that he did not enter a plea and did not pay any restitution, although his union may have done so. He denied that he had thrown anything at Hess' vehicle that night.

Louis Pare testified that he was an employee of the DNA and went on strike on July 13, 1995.[9] He testified that on the night of November 25, 1996, he was picketing at the entrance to the North plant with Hoffman and Keeland. At about 10 p.m., he saw Hess drive into the plant. He was familiar with the vehicle because Hoffman had pointed out the driver to him as someone who had nearly hit him once while he was crossing Mound Road. About 5 minutes after Hess had entered the plant, Hoffman walked to his vehicle in the parking lot. He saw a large number of police cars pull into the parking lot but he did not see Hoffman again that night. He said that at the time Hess' vehicle passed them he was standing on the north side of the driveway, that Hoffman was right beside him and Keeland was on the other side of Hoffman, and that Hoffman did not throw anything at the vehicle. He said that they were so close together that Hoffman would have hit him or Keeland in order to throw something. He said that he would not even have remembered what happened that uneventful night had it not been for the appearance of all the police cars.

[9] It is not clear from this record what Pare's current employment status is.

ANALYSIS AND CONCLUSIONS

I find that Hoffman was on strike at the time of the incident for which he was discharged, that it took place at a picket line, and that the Respondent considered him to be a striker. I also find the Respondent has established that it had a good-faith belief that Hoffman had thrown something at Hess' vehicle which cracked its windshield on November 25, 1996, based on the police and other reports that Kelleher reviewed. Damaging a vehicle crossing a picket line constitutes serious misconduct under *Clear Pine Mouldings* and is grounds for discharge. E.g., *Beaird Industries*, supra at 795–796; *Columbia Portland Cement Co.*, 294 NLRB 410, 420 (1989).

There is no dispute but that there was a large crack in the windshield of Hess' vehicle when the police arrived at the North plant on the night of November 25. However, the only evidence as to how and when the crack got there is the testimony of Hess. After observing his demeanor and listening to his testimony as a whole, I found him to be a completely unreliable witness and did not believe him. Although subpoenaed by the Respondent, he refused to appear or testify at this hearing until the subpoena was enforced in the Federal district court. The Respondent contends that his reluctance to testify on its behalf somehow enhances his credibility. I find just the opposite to be true. This matter arose entirely as the result of his claim that his vehicle had been damaged and it resulted in an employee being terminated. Yet, when the time came to back up his story and testify about it under oath, he made himself unavailable. He had been a cooperative witness as long as it served his purposes and he actually turned a profit by somehow getting both the State court and the Respondent to reimburse him for the cost of repairing the crack in his windshield. That fact alone casts significant doubt on his honesty. By the time of this hearing he was no longer employed by the Respondent. He apparently tried to avoid testifying by threatening to disclose information damaging to the Respondent which he claimed to have if he was not left alone. When the Respondent persisted, he proffered this alleged information to counsel for the General Counsel. I found the mendacious testimony he provided as a witness for the General Counsel, including, the purported provocative conduct of unidentified security guards, which was almost totally lacking in time, date, context, or verifiable detail, to be preposterous.

I found Hoffman to be much more believable than Hess. I credit his testimony about what occurred on November 25, and his denial that he did anything to damage Hess' vehicle. None of the Respondent's attacks on his credibility are persuasive. Moreover, the credible testimony of Pare supports Hoffman. I find no reason to believe that Pare would commit perjury to

assist Hoffman. Accordingly, I find that counsel for the General Counsel have established by a preponderance of the evidence that Hoffman did not throw anything at Hess' vehicle or damage it as it entered the North Plant on November 25. Since Hoffman did not engage in the misconduct for which he was discharged, that discharge violated Section 8(a)(3) and (1) of the Act.

2. Discharge of Manuel Sanchez

Manuel Sanchez has been employed by the DNA as a single copy driver since the JOA. He had previously worked for The News, beginning in September 1978. He is a member of Local 372, went on strike on July 13, 1995, and has not returned to work. He testified that during the strike he did picketing, passed out flyers, and distributed The Sunday Journal. By letter, dated April 22, 1997, he was informed that he was being discharged for damaging a newspaper rack in Wayne, Michigan, on December 5, 1995.

Kelleher testified that he made the decision to discharge Sanchez after reviewing certain documents. They were (1) a copy of Sanchez' photo identification card; (2) a Wayne police department incident report stating, inter alia, that on November 26, 1995, a witness had reported damage being done to a newspaper box outside a Kroger store in Wayne by a Hispanic male, wearing a baseball cap, who cut in front of her and put something into the coin slot making the box inoperable and then left the area in a teal-colored Thunderbird; that officers who responded found that a plastic knife had been broken off in the coin slot and could not be removed; and that Manuel Sanchez had been arrested and charged with the crime; (3) a Westland police incident field report, dated November 26, 1995, stating that Westland police officers had heard a radio report about the damage to the newspaper rack, had identified the vehicle as belonging to Sanchez and gone to his address where they spoke with him, and that when he was asked about damaging the rack he said that he should not say anything more as he might lose his job; (4) a DNA incident report, dated November 26, 1995, by James Ahrenberg, describing the vandalism to the rack at the Kroger in Wayne; (5) a DNA investigations report stating that a warrant had been issued charging Sanchez with malicious destruction of property and that he had appeared in Wayne District Court on April 1, 1996, pleaded guilty, was fined, placed on probation, and required to make restitution in the amount of $20; (6) a memorandum, dated March 15, 1996, indicating that the cost of repairing the newspaper rack in question was $20; (7) a letter, dated April 22, 1996, from the Wayne District Court Clerk forwarding a check for $20 in restitution for the damage to the newspaper rack in question; and (8) a letter, dated April 9, 1997, from the Wayne District Court Administrator stating that Sanchez had pled no contest to the charge against him, had been sentenced to pay $50 in costs, placed on probation, and ordered to pay $20 in restitution. Based on the information in these documents, he concluded that Sanchez had intentionally disabled the newspaper rack by placing a piece of plastic in the coin slot, making it inoperable by customers wanting to purchase newspapers, and that he should be discharged.

Yolanda Pulk credibly testified that on November 26, 1995, she went to the Kroger store in Wayne to shop. As she was about to put money in a vending machine in front of the store to purchase a newspaper, a man pulled up in car, got out, jumped in front of her, put what looked like a plastic ruler in the machine, and snapped it off. The man went to another machine, did the same thing, then got into a car and left. When she tried to put money in the machine she was unable to do so. She wrote down the license number of the man's car, went home, and reported the incident to the police. At the hearing, she identified the man as Sanchez from a photo she was shown.

Wayne Police Officer Rob Puckett credibly testified that on November 26, 1995, he was dispatched to the Kroger store to investigate a complaint of malicious destruction of property. When he arrived he found that the newspaper box had a broken plastic knife in the coin slot which prevented anyone from putting in coins to purchase a paper. He attempted to dislodge the plastic knife but was unsuccessful.

Westland Police Sergeant Tom Harris credibly testified that on November 26 he heard a radio broadcast about the damage to the newspaper box. He found that the vehicle was registered to a Westland address. As he was going there, he saw a car matching the description turn into a driveway. He spoke with the driver, Sanchez, who was wearing a baseball cap. He asked Sanchez, who was very nervous, if he had been at the Kroger and he responded that he did not believe he should say anything more because he could lose his job.

Manuel Sanchez testified that he was outside the Kroger store in Wayne that day passing out copies of The Sunday Journal for about 45 minutes beginning at 11 a.m. He said that he saw two newspaper boxes outside the store that there were newspapers in both and people were purchasing them without difficulty. He also said that he was being watched by a person who ran forward every time he went near the newspaper boxes. He denied that he ever touched the boxes or did any damage to them. As he returned to his home after stopping at a drug store and to donate blood, he noticed two police cars behind him. He was put in one of the police cars and questioned. The police officers said they were going to arrest him for damaging a newspaper rack. However, they got a radio call that there was no damage to the rack and they let him go. He said that evening he went back to the Kroger store to look at the racks, that both were empty, and that both had newspapers in them when he left the store that morning. He later got a letter informing him that there was a warrant for his arrest. He pled no contest and paid restitution because he could not afford a lawyer and he was told that the record would be expunged.

ANALYSIS AND CONCLUSIONS

The Respondent contends that because there was no picket line or strike-related activity going on at the time of this incident, the Board's *Rubin Bros.* analysis does not apply to this discharge. I do not agree. Sanchez was on strike at the time of the incident. It is his status as a striker, not the nature of the incident which led to his discharge, that makes *Rubin Bros.* applicable. I find that the Respondent has established that it had a good-faith belief that Sanchez had vandalized a newspaper rack on November 26, 1995, based on the police and other reports that Kelleher reviewed in making the decision to discharge him. Although there was no specific evidence explain-

ing why the discharge did not occur until almost 18 months after the incident and a year after the disposition of the criminal charges against Sanchez, under the circumstances, I do not consider that significant. During and after the strike, the Respondent had in place a procedure for investigating and taking action on allegations of strike-related misconduct which involved hundreds, if not thousands, of such incidents. There is nothing to indicate that this case was treated any differently than the others or that Sanchez was in any way disadvantaged by the delay. Unlike the cases cited by counsel for the General Counsel,[10] there is no reason to believe that the Respondent had initially ignored or condoned Sanchez' conduct. The evidence shows that it pursued criminal charges against him immediately after learning about the incident on November 26, 1995. I also find that the reference in his discharge letter to the incident occurring on "December 5, 1995," was an obvious clerical error which in no way misled or disadvantaged Sanchez or the General Counsel.

I find that counsel for the General Counsel have not established by a preponderance of the evidence that Sanchez did not engage in serious misconduct. Despite Sanchez' claim that by the evening of November 26, 1995, the racks outside the Kroger were empty, implying all the papers had all been sold, there is credible and uncontradicted testimony by Pulk and Puckett that the newspaper rack was rendered unworkable by a piece of plastic being broken off in the coin slot. Vandalizing the property of an employer or nonstriking employees constitutes serious misconduct under *Clear Pine Mouldings*. I do not credit the self-serving testimony of Sanchez that he was told by the police that no damage had been done to the rack when they released him. Wayne Police Lieutenant Thomas Miller credibly testified that he took the initial report from Pulk by telephone and that Sanchez was released, at his direction. The police report states that this was because Pulk was not available to identify him.

Most important, the testimony of Pulk establishes that Sanchez was in fact the person who vandalized the rack that day. She was a credible witness. She has no relationship with the Respondent and reported Sanchez' vandalism to the police on her own because it prevented her from buying a newspaper that contained information about a relative that she wanted to read. There is simply no reason to believe that she fabricated this story. The only possible discrepancy is the fact that she testified she saw Sanchez vandalize two racks, while the police reports and other evidence indicate only one rack was damaged. It may be that the plastic piece he inserted into the second rack did not do the job or she may have been mistaken about what he did to the second rack. The fact remains that a rack was damaged and there is substantial credible evidence that Sanchez did it. I shall recommend that this allegation be dismissed.

3. Discharge of Gregory Lysz

Gregory Lysz has been employed by the DNA since the JOA and had previously worked for one of the newspapers since June 1977. He is a member of Local 372. He went on strike on July 13, 1995, and has not returned to work. By letter, dated April 22, 1997, he was informed that he was being discharged for committing assault and battery on two newspaper carriers in Pontiac, Michigan, on June 6, 1996.

Kelleher testified that he made the decision to discharge Lysz after reviewing certain documents. They were (1) a copy of the photo identification card of Lysz; (2) a Pontiac police incident report, dated June 9, 1996, stating that a Michigan State Police Officer Cynthia Johnson had reported observing an assault by a group of five or six striking newspaper workers on two workers, Robert and Randall Shannon, at a newsstand, that the assault stopped and the suspects fled when Johnson drew her weapon, that she recorded the license numbers of the suspects' vehicles, and that one victim suffered head lacerations; (3) photographs shown to the Shannons for identification purposes; (4) a DNA investigations report about the incident on June 6, stating that Robert Shannon had sustained a head injury requiring nine stitches, that Roger Edwards had been charged with two counts of felonious assault and that Lysz had been charged with a misdemeanor, and that his trial date had been postponed several times; (5) a Michigan State police incident report, dated June 9, 1996, by Officer Johnson, stating that while driving home from work about 7:30 a.m., she saw three or four males, carrying picket signs, cross the road in front of her to a parking lot where they approached and assaulted two newspaper salesmen with their picket signs, striking them about the head and upper body, that she got out of her vehicle, drew her gun, and ordered the suspects to stop, that they went across the street to their vehicles and drove away, that she got descriptions and the license numbers of three vehicles and reported the incident by telephone to the Pontiac Police; (6) an estimate for repairs to the vehicle of Robert Shannon in the amount of $902.75; (7) a North Oakland emergency medical center report, dated June 9, concerning treatment of Robert Shannon for a head laceration; (8) a photograph of the injury to Robert Shannon's head; (9) an unsworn statement by Randall Shannon, dated June 11, 1996, concerning the incident; (10) an unsworn affidavit of Ed Barkley stating that, on June 10, 1996, he had seen a videotape of the incident and had identified Lysz and Edwards, whom he has known for 17 and 7 years, respectively, as being shown in it; (11) a 50th District Court docket sheet, dated March 23, 1997, concerning the charges against Lysz; (12) a report by Pontiac Police Detective Ronald Carpenter, dated June 13, 1996, stating that Randall Shannon had identified Edwards and Lysz as two of the picketers who struck him, Edwards with a picket sign stick and Lysz with his hands, and that Edwards had also struck his father, that both Shannons had identified Edwards from a photo array as the person who struck Robert in the head with the stick but could not identify Lysz, that Edwards and Lysz had been identified on the videotape of the incident by DNA employees who know them, and that two of the license plates had been traced to vehicles belonging to Edwards and Lysz. Based on the information in these materials, Kelleher concluded that Edwards and Lysz had made an unprovoked attack on the Shannons, which had injured the elder Shannon, and that they should be discharged. He also testified that there was a typographical error in the discharge

[10] *Mashkin Freight Lines*, 272 NLRB 427, 435 (1984); and *K&E Bus Lines*, 255 NLRB 1022, 1042–1043 (1981).

letter sent to Lysz and that the correct date of the incident referred to was June 9, 1996.

Robert Shannon has been an independent contractor selling newspapers for over 20 years. On June 9, 1996, he was selling newspapers at his usual corner in Pontiac. His son Randall was with him and had a video camera. He testified that, as they got out of his truck in the parking lot, a group of people came across the street and jumped his son, saying that they had not given him permission to film them. He took the camera from Randall who was fighting them and put it in his truck. He grabbed at the picket stick that Edwards was carrying and was struck on his head causing a cut that required nine stitches. He said that Lysz was one of the men who jumped and were pounding on his son. Lysz did not have a picket stick but was hitting him with his fists. He said that he saw a woman who had pulled up in a pickup standing there with a gun but he did not know that she was a police officer. He identified photos of both Edwards and Lysz at the hearing. He said that on the date of the incident he did not identify Lysz by name because he did not know what it was. He testified that he had seen the same group picket on the same side of the street with him for several weeks before this incident and that they had not brought a video camera before.

Randall Shannon testified that he was currently employed part time by the DNA. On June 6, 1996, he stopped by where his father was selling newspapers as he did each week, and as picketers arrived he began videotaping them. Three of the picketers came towards him and one said, "[L]et's get the camera away from that mother fucker." He said that Lysz struck him with his fists and that another man hit him with his fists after his stick broke. At the hearing he identified a photo of Lysz. He said that he fought back for a minute or two and then noticed that his father's head was bleeding and that the three picketers were heading back across the street. He said that he struck back after being hit three times and that, after Lysz struck him in the neck with his fist, he grabbed him in a headlock and punched him a couple of times before letting him go.

Lysz testified that on June 9, 1996, he went to Pontiac to picket a site where Sunday newspapers were being sold as he had done previously for several weeks. He drove there with Jim Rogers and arrived at the same time as Roger Edwards and Joe Turk. They parked across the street from the vendors. He noticed that the vendor was videotaping them as they were putting on rain gear. He began to cross the street along with Edwards and Rogers who were carrying picket signs. He was not carrying anything as he was awaiting the arrival of copies of The Sunday Journal to pass out. Either Edwards or Rogers said "[Y]ou don't have permission to take my picture, mother fucker," and the other said something like "[L]et's get that video camera from those people." They approached the vendors and Edwards and Rogers hit the camera with their signs. Randall Shannon approached him before he reached the sidewalk and put him in a headlock. He heard a crack and saw part of a picket sign fall to the ground. He heard someone say that there was a woman with a gun and Shannon released him. He picked up his glasses and hat and went back to his vehicle. He denied that he had ever struck either of the Shannons. He was later charged with misdemeanor assault, pled no contest under advisement, and paid $400 restitution.

Roger Edwards testified that after arriving at the scene to picket the newspaper vendor, he saw Randall Shannon was there with his father and had a camera. He started to walk across the street with Rogers beside him and Lysz behind them. He put his sign in front of his face because he was being filmed and was looking down to see the curb and, as he stepped up on the curb, Randall placed him in a headlock. After a few seconds he pulled free and stepped back and saw Rogers and Robert Shannon rolling around on the ground. He saw Randall take two or three steps into the street and grab Lysz in a headlock. He then hit Randall in the head with his picket sign stick so that he would release Lysz which he did immediately. A young woman stopped and asked if she should call the police and when someone said she has a gun they all turned around and left. He said that he never saw Lysz go onto the sidewalk or hit anybody during the incident. He also said that while they made comments about the video camera, they made no attempt to get at it. He also denied striking Robert Shannon with his picket stick. He was charged with two counts of felonious assault and, in a plea bargain, pled guilty to a misdemeanor.

ANALYSIS AND CONCLUSIONS

The Respondent contends that *Rubin Bros.* should not apply to this discharge because it did not arise from misconduct on a picket line. I disagree. Lysz was a striker, the incident grew out of an attempt set up a picket line, the Respondent handled the disciplinary action against him according to the procedure it set up to deal with strike misconduct, and the personnel action report it used indicates he was discharged for a "strike related incident." In any event, under these circumstances, it is Lysz's status as a striker that determines whether *Rubin Bros.* applies, not the nature of the incident. I find that the Respondent has established that it had a good-faith belief that Lysz was one of a group of picketers that had engaged in serious misconduct when they assaulted the Shannons on June 9, 1996, based on the videotape of the incident and the documents that Kelleher reviewed. Those documents indicate that the Shannons were the victims of an unprovoked violent attack, in which Lysz was an active participant.[11]

I also find that counsel for the General Counsel have not established by a preponderance of the evidence that Lysz did not strike Randall Shannon or that he did not willingly participate in the attack on the Shannons. There is no dispute but that Lysz was at the scene and that he crossed the street with Edwards and Rogers just prior to the assault. I find no reason to doubt the credible testimony of Randall Shannon that Lysz hit him with his fist before he put him in a headlock. I also find no reason to credit the self-serving testimony of Lysz over that of Randall. The testimony of Edwards that he did not see Lysz strike anyone does not establish that it did not happen since it is clear that he did not have Lysz in view at all times. Moreover,

[11] There is apparently no contention that the fact that the Shannons may have pointed their video camera at the picketers was sufficiently provocative to justify their actions. If there is, I reject it and find that their response was totally out of proportion to any perceived offense and was completely unjustified.

much of his testimony was contradicted not only by the Shannons, but by Lysz as well, and was incredible. According to Edwards, he was a victim. He had made no effort to get at the video camera and had done nothing to either of the Shannons before Randall grabbed him and put him in a headlock. After he broke free, Randall went into the street to grab Lysz who had, likewise, done nothing more provocative than walking across the street.

The evidence shows that Lysz, Edwards, and Rogers went across the street in order to intimidate the Shannons and stop Randall from videotaping, that Edwards and Rogers attempted to take away the camera or smash it with their picket sticks, and that when the Shannons resisted they were violently assaulted. There is clear evidence that Lysz was a part of the group that attacked and injured Robert. Under these circumstances, even if he had not struck Randall, his participation in this group assault constituted serious misconduct and was grounds for his termination. See *GSM, Inc.*, 284 NLRB 174, 175 (1987) (Smith discharge).

4. Discharge of James Schafranek

James Schafranek has been employed by the DNA as a mailer since June 1980. He is a member of Local 2040. He went on strike on July 13, 1995, and has not returned to work. He did picket duty at various locations during the strike. By letter, dated July 29, 1997, he was informed that he was being discharged for coercively threatening and intimidating a DNA employee in Detroit on May 9, 1997.

Kelleher testified that he made the decision to discharge Schafranek after reviewing certain documents. They were (1) a photo identification card of James Schafranek; (2) a DNA employee incident report by Dave Stavale which states that on May 9, 1997, as two former mailers, Frank Prainito and Jim Schafranek, drove next to his vehicle for about four miles, they gestured with the middle finger and simulated shooting a gun with their hands and muttered "bang" and "we are going to shoot you;" and (3) an unsworn affidavit of Dave Stavale, dated May 14, 1997, in which he describes seeing Prainito and Schafranek, with whom he had worked for 18 years, gesture at him with the middle finger and change the gesture to that of a gun as they emphatically mouthed "bang" and "we are going to shoot you." Kelleher said that, based on the information in these documents, he concluded that Schafranek had made gestures that were threatening and intimidating to Stavale and that he should be discharged. He also said that he was contacted by a Union representative named Young concerning Schafranek's discharge he did a followup investigation. However, he had no recollection of any discussion with Young and gave no details of this followup investigation. I conclude that he had acquired no more information than was available to him when he made his initial decision to discharge Schafranek.

Stavale has become a supervisor for the DNA since returning to work before the end of the strike. On May 7 or 9, 1997, he was driving westbound on I-94 when a car pulled alongside his van on the passenger side. He recognized the occupants as Schafranek and Frank Prainito with whom he had previously worked in the mailroom. They made eye contact with him and began to give him the finger. He smiled and waved at them. After several hundred yards, Prainito who was driving pointed his finger at him like a gun and said, "Bang, we're going to shoot you." Schafranek leaned over and made a similar gesture. The windows of both vehicles were closed and he did not hear what they said but read their lips although he has no training as a lip reader. He felt they were serious, took it as a threat, and reported it to security.

Schafranek testified that when he received the discharge letter he had no idea what it referred to and contacted his union president who got more information about it. He said that on that day he and Prainito were driving to the union hall on I-94 when they saw Stavale, with whom they had worked and had been a close friend until he returned to work, cross in front of them in a van. They came up beside the van and Stavale smiled and waved at them. He and Prainito gave him the finger and said, "fuck you" and "fuck you scab" several times. He said that they also made gestures with their thumbs that they had previously used to joke with Stavale, who had lost part of a thumb in an industrial accident, when they all worked together. He said that Stavale looked disgusted and waved his hand at them. He denied that he had ever made his hand look like a gun or that he said "bang" or that he had ever said he was going to shoot Stavale. He also said that he did not see Prainito do any of those things.

ANALYSIS AND CONCLUSIONS

The Respondent contends that *Rubin Bros.* does not apply in this case because at the time of this incident the strike was over and it did not involve activity at or near a picket line. I do not agree. It is Schafranek's status as a striker who had not returned to work that is determinative, not where or when this incident took place. The evidence shows that the Respondent investigated and took action on this incident according to the procedure that it set up specifically to deal with strike-related incidents. Moreover, as it points out in its brief, what is essentially a trivial incident resulted in the discharge of a longtime employee because of "the hostility and violence associated with this strike."

I find that the Respondent has established that it had a good-faith belief that Schafranek had threatened to shoot Stavale based on the reports that Kelleher reviewed and the absence of any evidence to the contrary being available to him. I also find that counsel for the General Counsel have established by a preponderance of the evidence in this record that Schafranek did not engage in serious misconduct.

Having observed him while testifying, I found Schafranek to be a credible witness and I believed his testimony about what he said and did during the incident. Although it is clearly self-serving, considering all of the evidence, I find that fact does not render his testimony unworthy of belief.[12] I found his testi-

[12] Schafranek's version of what occurred is corroborated in large part by the testimony of Prainito. Although, as discussed at length in *DNA I*, I did not believe much of Prainito's testimony and would not rely on his word alone, I find no reason to doubt his corroborating testimony about this incident. As the Respondent points out, like Stavale, Prainito was busy driving his vehicle and may not have seen every gesture Schafranek made; however, unlike Stavale, he was in a position to hear everything that was said. There is simply no reason to believe that

mony much more credible and probative than the evidence to the contrary. That consists solely of Stavale's conclusory testimony about what he observed Schafranek do while seated in the passenger side of the other vehicle, while Stavale was driving his van in traffic on an interstate highway at speeds of 55 to 60 miles an hour. It is undisputed that the windows of both vehicles were closed and that Stavale did not hear anything that Schafranek said during the incident. Stavale admits that he has had no training as a lip reader and no evidence was presented at the hearing to substantiate his claim that he was able to determine what Schafranek was saying by reading his lips. Schafranek was a considerable distance away in another fast-moving vehicle while Stavale was driving his own vehicle. He also failed to demonstrate or describe in detail the gestures that he claims Schafranek was making that simulated a gun. Given Schafranek's credible and uncontradicted testimony that a "thumbs up" gesture he was making had long been used as a joke between the parties, I find that it was incumbent on Stavale to demonstrate the exact nature of the gestures Schafranek was making. He did not do so. There is no evidence that Schafranek and Prainito intentionally pursued Stavale or that this was anything but a fortuitous encounter, which ended when Prainito pulled off the interstate at his exit while Stavale continued on. There is also none that there had been any previous interaction between Stavale and Schafranek that would have led Schafranek to make a threat to shoot Stavale, a threat which Stavale did not bother to report to the police.

I find that Schafranek did not engage in the misconduct for which he was discharged and that the discharge violated Section 8(a)(3) and (1).

5. Discharge of Gerald Kociemba

Gerald Kociemba has been employed by the DNA since the JOA and had previously worked for one of the newspapers beginning in 1967. He is a member of Local 2040. He went on strike on July 13, 1995, and has not returned to work. By letter, dated April 22, 1997, he was informed that he had been discharged for harassing and intimidating an employee with his vehicle on February 15, 1997.

Timothy Kelleher testified that he made the decision to terminate Kociemba after speaking with the alleged victim of the harassment, his son Joseph Kelleher, and reviewing certain documents. They were (1) a copy of Kociemba's photo identification card; (2) an employee incident report, dated 2/18/97, by Joe Kelleher, stating that as he was leaving the North Plant at 9:00 p.m. on February 15, an individual tailgated his vehicle, motioned to him and yelled at him, and attempted to cut him off by swerving in front of him and slamming on his brakes; (3) a Sterling Heights police incident report, stating that J. Kelleher reported that a vehicle had tailgated his, swerved into his lane, and slammed on its brakes, that the vehicle in question (a silver and red Dodge Dakota pickup) was registered to Leonard Kociemba and was primarily driven by Greg Kociemba, that DNA security had reported that J. Kelleher had identified Gerald Kociemba as the driver, and that he said that he was at work at the time of the incident; (4) an unsworn affidavit of Joseph Kelleher, dated February 19, 1997, detailing the incident on February 15, and (5) a DNA investigations report by Jesse Bartlett stating what J. Kelleher had told him about the incident, that Kelleher was shown photos of Leonard and Gerald Kociemba, and that he had identified Gerald Kociemba as the driver involved in the incident. Timothy Kelleher said that based on the information he received he concluded that his son had clearly identified the person who attempted to run him off the road as Gerald Kociemba, that he was the person who was involved in the incident, and that he should be terminated.

Joseph Kelleher testified that as he left the North Plant where he worked as a machine operator at about 9:00 p.m. on February 15, 1997, he saw a group of five to seven picketers at the entrance. As he got into his vehicle, one of the picketers went to the nearby Excello parking lot and got into a pickup truck. As he exited the driveway, the pickup waited for him to pull onto Mound Road and pulled up behind him as he drove towards a turn-around. After he made the turn-around, the pickup followed and began tailgating him. The pickup pulled up on his right and the driver began yelling and motioning at him. After a quarter of a mile, he was going about 40 miles an hour when the pickup pulled into his lane almost hitting his vehicle. It then slammed on its brakes causing Kelleher to do the same and narrowly avoid hitting the pickup. As they continued forward, he was able to see the license number and wrote it down. He dialed 911 on his cell phone and gave a description of the vehicle and the license number. As he did so, the pickup entered a turn-around and went the other way on Mound Road. He also reported the incident to security at the North Plant. At the hearing, he identified a photograph of Gerald Kociemba as the driver of the pickup and said he had no doubt that it was him.

Gerald Kociemba testified that during the strike he was employed by The Macomb Daily on a part-time basis and was working there on the date of this incident from 4:00 p.m. until 1:45 a.m. the following morning. His job that night was "trucking whites" which involves moving bundles of papers from a conveyor to two filling machines with handtrucks. He said that this is a continuous process and if he did not perform his duties the machines would run out of parts and stop production. He did not leave the plant at any time that night. He was not at the picket line at the North Plant that night and has never picketed there. He does not know who Joe Kelleher is and has never seen him. He said that he owns a two-tone blue 1991 GMC pickup which he drove to work that night. He does not own a silver Dodge Dakota pickup and has never driven one. His brother Leonard has owned one which was usually driven by his nephew Greg Kociemba. He said that he received a letter from the Sterling Heights police telling him he was charged with reckless driving on February 15, 1997, but that the charge was later dismissed.

Frank Kociemba, who is Gerald's son, testified that he is a foreman at The Macomb Daily and was in charge on February

Schafranek would not have spoken aloud when he was gesturing at Stavale.

15, 1997.[13] He said that his notes for that date show that Gerald was assigned to "trucking whites" and that a 30-minute lunch break was taken, beginning at 6:02 p.m. They also show that the presses were running between 8 and 9 p.m. that night except for a 9-minute period beginning at 8:12 p.m. He had no recollection of his father leaving the plant that night and said that, if he had left during production that night, the machines would run out of whites and would have stopped operating.

Leonard Kociemba testified that he also worked at The Macomb Daily on February 15, 1997, and that he has never driven his Dodge Dakota to work there. Greg Kociemba testified that to his knowledge Gerald Kociemba has never driven his Dodge Dakota. He said that on the night of February 15, he had driven the Dakota to a union hall at 15 Mile and Mound Road where he had left it locked for 5 to 6 hours until he retrieved it at 2 or 3 a.m. the next morning. Joseph Burns testified that on February 15, he was working at The Macomb Daily as a stacker who took bundles of papers and loaded them onto handcarts. Gerald Kociemba would then move them to the machines 50 to 60 feet away and bring back the empty carts. He said that he saw Kociemba as they worked together throughout that evening and that he did not leave the plant.

ANALYSIS AND CONCLUSIONS

The Respondent contends that *Rubin Bros.* does not apply to this issue because the strike had ended the day prior to this incident. I do not agree. It is Kociemba's status as a striker who had not returned to work that is determinative, not where or when this incident took place. I find that the Respondent has established that it had a good-faith belief that Kociemba had engaged in serious misconduct based on the information available to Timothy Kelleher which indicated Kociemba had been identified as the driver of the vehicle that had been driven in an intimidating manner and nearly collided with that of Joseph Kelleher on several occasions that night. I also find that counsel for the General Counsel have established by a preponderance of the evidence that Gerald Kociemba was not driving the vehicle that harassed Kelleher.

While I do not doubt that Joseph Kelleher was testifying truthfully about actions of the driver of the Dodge Dakota, there is substantial credible direct and circumstantial evidence that at the time of the incident Gerald Kociemba was working at The Macomb Daily. I find this evidence more probative than Kelleher's identification.

An eyewitness identification is not infallible, as was seen in *DNA I* in the case of the discharge of Michael Burke. Burke was positively identified as being present at a picket line at the Hayes Distribution on August 29, 1996, by a former long-time coworker who viewed a videotape which repeatedly showed the person in question. However, convincing evidence established that Burke was in fact working at another location at the time he was alleged to be at the picket line. Here, the only evidence placing Kociemba at the scene of this incident is his identification by Joseph Kelleher from a photo ID card. From all that appears, Kelleher had never seen Kociemba before and the identification was based on the perceptions he got while undergoing a harrowing, traumatic experience, at night, and while driving his own vehicle. Beyond that, it appears that Kelleher was shown the ID photos of only Gerald and Leonard Kociemba by DNA security personnel when he made his identification. They were obviously selected because ownership of the Dakota was traced to a Kociemba and that fact may well have influenced Kelleher's identification.

The Dakota that Kelleher identified did not belong to Gerald and he testified credibly that he had not only not driven it on the night of February 15, but that he had never driven it. The records of The Macomb Daily and the credible testimony of Gerald and Frank Kociemba and Burns establish that Gerald was at work from 4 p.m. on February 15 until 1:45 a.m. the next morning, doing a job that would not have permitted him to leave the plant for more than a few minutes without disrupting production, let alone the minimum of 30 to 40 minutes it would have taken him merely to drive back and forth to the North Plant. The Respondent's contention that he did so and went to the North Plant at about 9 p.m. is pure speculation. It has presented nothing to cast any doubt on the testimony and notes of Frank Kociemba that the 30-minute lunchbreak that evening (the one time that Kociemba could have left the plant without disrupting production) began shortly after 6 p.m. The general testimony of the Respondent's witness, Macomb Daily Production Director Ralph Eagan, that on occasion employees have left the plant when they were supposed to be working, does not purport to establish that Gerald Kociemba had ever done so or that he did so on February 15. In fact, Eagan testified that he did not know if Gerald had left the plant that night. Eagan's testimony corroborates rather than calls into question much of the testimony of the General Counsel's witnesses, including, the fact that Gerald was at work that day, his work assignment, and that the lunch break began at 6:02 p.m.

I find that the Respondent's attack on the credibility of the General Counsel's witnesses is not persuasive. While there is a familial relationship between the various Kociembas, after observing them while testifying and considering all of the other evidence, I have no reason to doubt the testimony of Gerald, Frank, or Leonard. I found Burns to be a credible and persuasive witness and his testimony is uncontradicted. Moreover, he is a former policeman with no pecuniary interest in this matter and there is no reason to believe that he would commit perjury.

I find that the evidence establishes that Gerald Kociemba was not involved in the vehicular assault on Joseph Kelleher on February 15, 1997, and that his discharge on that basis violated Section 8(a)(3) and (1) of the Act.

F. Alleged Disparate Treatment

In *DNA I*, I found that counsel for the General Counsel had not established that this Respondent had discriminated against strikers by knowingly tolerating behavior by nonstrikers or replacement workers that was as serious or more so than the conduct for which any striker was discharged. The only new evidence presented here was the testimony of Hess purporting to establish that security guards engaged by the DNA had engaged in acts of misconduct. As discussed above, I did not

[13] He is a member of Local 2040, had previously worked for the DNA, but during the strike had been fired for stealing newspapers from a carrier.

believe any of his testimony about this alleged behavior and in any event there was no evidence that the DNA was made aware of anything that Hess claimed to have observed. I find there is no evidence that any striker discharged by the DNA was a victim of disparate treatment.

CONCLUSIONS OF LAW

1. The Respondent, Detroit Newspaper Agency, d/b/a Detroit Newspapers, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent, Detroit Newspaper Agency, d/b/a Detroit Newspapers, violated Section 8(a)(3) and (1) of the Act by discharging Larry Hoffman, James Schafranek, and Gerald Kociemba because of their membership in or activities on behalf of a labor organization.

4. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees who are unfair labor practice strikers, it must offer them immediate reinstatement and make them whole for any loss of earnings and other benefits from date of discharge to date of proper offer of reinstatement, *Abilities & Goodwill, Inc.*, 241 NLRB 27 (1979), less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Detroit Newspaper Agency, d/b/a Detroit Newspapers, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging its employees' activity on behalf of a labor organization by discharging striking employees who have not engaged in serious misconduct.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Larry Hoffman, James Schafranek, and Gerald Kociemba full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Larry Hoffman, James Schafranek, and Gerald Kociemba whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at each of its facilities in the State of Michigan, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 31, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found herein.

Dated, Washington, D.C. March 13, 2000

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered.

WE WILL NOT discourage our employees' activity on behalf of a labor organization by discharging striking employees who have not engaged in serious misconduct.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Larry Hoffman, James Schafranek, and Gerald Kociemba full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Larry Hoffman, James Schafranek, and Gerald Kociemba whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Larry Hoffman, James Schafranek, and Gerald Kociemba, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

DETROIT NEWSPAPER AGENCY, D/B/A DETROIT NEWSPAPERS